No. 15,796

United States Court of Appeals

For the Ninth Circuit

G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, Trustees of John W. Smeed Estate,

Appellants,

vs.

Sam Wahyou, Diamond-S Ranch Co., Sam Wahyou, K. R. Nutting and Thomas G. Lee, as Trustees of the assets of Diamond-S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang,

Appellees.

Appeal from the United States District Court for the District of Nevada.

APPELLANTS' PETITION FOR A REHEARING.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Walter L. Pope, Frederick G. Hamley, and Wm. E. Orr, Circuit Court Judges:

I.

STATEMENT OF REASONS WHY REHEARING SHOULD BE GRANTED.

A rehearing should be granted in this case for the reason that an error in the opinion, of a fundamental

nature, if corrected, would reverse the holding of this Court.

Paragraph 2 of page 1 of the opinion of the United States Court of Appeals contains the following statement:

> "Appellants appeal from a judgment based on said findings, upon the sole ground that the evidence is not sufficient to support the findings."

We believe that this is an erroneous statement and respectfully call the Court's attention to transcript (2) page 21:

> "6. The Court erred in granting Judgment to the defendants on Counts 2, 3 and 4 of the Amended Complaint for the reason that the burden of proof being on the defendants was not sustained."
>
> "7. The Court erred in failing to grant plaintiffs' Motion for Judgment at the close of defendants' case for the reason that the defendants failed to sustain the burden of proof as to the bona fides of the transaction."

(From the statement of points upon which appellants intend to rely on appeal.)

II.

SUMMARY STATEMENT OF THE CASE.

The defendant Wahyou was the director of the Diamond S Ranch, a Nevada corporation, which had been dissolved. The defendant Archie Corbari owned 20 percent of the stock of the corporation at the time

of the dissolution, the certificate calling for 310 of the 1571 shares outstanding. Corbari had pledged the certificate of stock to the Bank of America at Stockton, California, prior to the dissolution of the corporation. While the corporation was in dissolution the pledge was purchased by Wahyou from the Bank. Prior to the time Wahyou purchased the pledge from the Bank, and after the corporation had been dissolved, Corbari gave an assignment to John W. Smeed, and these plaintiffs are the executors of the estate of John W. Smeed, deceased.

Wahyou foreclosed the pledge and purchased the certificate of stock at the foreclosure sale for $5,000.00. After Wahyou purchased the certificate of stock the corporation was revived under the laws of Nevada.

The case was originally before the trial Court on motions for summary judgment by both sides. The trial Court found for the defendants, and on appeal the case was sent back to the trial Court with instructions that the burden of proof be placed upon the defendants to establish by a preponderance of the evidence the bona fides of the transaction. On retrial, at the close of the defendants' case the plaintiffs moved for judgment upon the ground and for the reason that defendants failed to sustain their burden of proof in this respect. This motion was denied. We believe that it should have been granted, and that there was no basis in the evidence or law for the Court's denial of the motion.

We believe that there is a total lack of any evidence on the part of Wahyou as to the bona fides of the

transaction, (*Faivret v. First Nat. Bank in Richmond, et al.,* 160 F. 2d 827, 831; *Pepper v. Litton,* 308 U.S. 295, 306, 84 L.Ed. 381, 60 S.Ct. 238) and that while the Court characterized the matter as conflicting but substantial to sustain the findings and conclusions, we believe that there is no evidence of any nature to sustain the findings and conclusions as set forth.

> "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside."
>
> *Lebold v. Inland Steel Co.,* 125 F. 2d 369;
>
> *Austrian v. Williams,* 103 F. Supp. 64.

III.

DISCUSSION OF GROUNDS FOR REHEARING.

The defendant Wahyou occupied a dual position of trust. First, he was a trustee by the Nevada statutes, being the director of a dissolved corporation, and as such, is charged with the duties of a trustee.

Wahyou was in a fiduciary relationship as a pledge holder and could not purchase the property of the pledge unless he paid adequate consideration therefor, and he could not deal with the pledged property except in an arm's length transaction.

The pledgee is held to the utmost of good faith in dealing with the pledged property.

English v. Culley, 259 P. 355;
76 A.L.R. 705, 722;
37 A.L.R. 2d 1381, 1383.

Let us review the evidence in the record that must be relied upon in order to sustain the position of the trial Court.

Wahyou testified twice by deposition and once in Court. (Transcript (1) pp. 102-105, Transcript (2) pp. 65-74, 148.) In each instance he testified that his purpose in purchasing the pledge was to foreclose it, and that he desired to make money and to protect himself on other obligations owed him by Corbari. In other words, his testimony was that he initiated the transaction for the sole purpose of protecting himself and making money from the deal. This could not have been an arm's length transaction! He repeatedly stated that he believed the property to be worth considerably more than he paid for it. In no instance did he ever say that he intended to pay any overplus to Corbari, but on the contrary, he said that he did not intend to do so. (Transcript (2) pp. 82-83.)

Our position is that the burden was upon Wahyou to prove by a preponderance of the evidence that he fully and fairly discharged his fiduciary duty to Corbari and to plaintiffs. This he could not possibly do when, by his own admission, he purchased the stock for the sole purpose of protecting himself on another debt owed him by Corbari and the only way to secure himself as to the second debt was to make money in purchasing the stock involved herein. A pledgee cannot deal at arm's length with the pledgor when, by his own admission, his intention was to make money out of the transaction.

Now let us examine the only other evidence available to show the bona fides of the transaction. The Court quotes at length from the balance sheet of the Diamond S Ranch and uses the book value of the stock as a basis of determining the value. However, the auditor, Mr. Buxton, on cross-examination (Transcript (2) pp. 63-64) testified that the book value does not in any way reflect the true value or the market value of the property. We feel that the auditor admitted that book value was irrelevant for the reason that it did not reflect the true value, that is, either the sale value or the market value of the property.

There were two other witnesses for Wahyou. Mr. Frank Hogue, who was a stockholder of the corporation and who testified that he paid $35,000.00 for a one-third interest in the property. This is one of two sales of stock consummated during the period of time in which we are interested. This sale of 500 shares for $35,000.00 amounts to approximately $70.00 a share, whereas the purchase by Wahyou of the Corbari stock amounted to $5,000.00 for 310 shares or $14.00 a share. Certainly the testimony of the sale of stock in this matter did not establish the bona fides but on the contrary tended to show that Wahyou did profit from his fiduciary position.

The Court quotes from the testimony of witness Nutting, the other witness for Mr. Wahyou, as to the total value of the real property, but again we believe the Court overlooked the tremendously unfavorable testimony of Nutting, in that at page 28 of the second transcript, Nutting testified that he bought 489

shares of stock from Wahyou for $20,000.00 which is $40.00 per share. This purchase of stock together with the purchase by Hogue represent the only transactions in the stock during the time in which we are interested. One sale, that to Hogue, brought nearly $70.00 a share, and the sale to Nutting brought $40.00 a share. These were both sales by Wahyou and contrast vividly with his purchase of the stock from Corbari at $14.00 a share.

The fact that Wahyou may or may not have made money out of the transaction is immaterial. The rule is that he must deal at arm's length with the best interests of his beneficiary or pledgor in consideration. There is not a single word anywhere in the transcript which indicates any desire or intention on the part of Wahyou to do that.

It is the position of the petitioners for rehearing that the burden placed upon Wahyou was not met and that there isn't a scintilla of evidence in the record which would support the burden placed upon him. On the contrary, the record is replete with evidence that he intended to, and tried to enrich himself at the expense of Corbari, who was the pledgor of the purchased stock.

The sole question comes down to this: Can a Court find, as a matter of law, that a man has acted at arm's length with the beneficiary or acted as a fiduciary should act even though the trustee fiduciary has testified that he intended to make a profit out of the transaction at the expense of the pledgor-beneficiary?

To have arrived at this decision it was necessary to completely ignore the testimony of the pledgee-trustee. From the very beginning he asserted an intention diametrically opposed to that trust placed upon him by law. He did everything he could to carry out that intention. How, then, could the Court say that he sustained the burden of proof and established his good intentions when every statement he made was to the contrary?

Stated another way, if the defendant Wahyou had accomplished what he set out to do, that is, to make 10 or 15 thousand dollars out of this transaction, the Court would have immediately set it aside for the reason that he could not profit at the expense of his beneficiary.

There is no proof that he hasn't, can't or won't profit from this transaction. The Court's attention is respectfully called to the fact that never has Wahyou said, "I don't think the stock is worth any more than I have paid for it and you can have it at that price." On the contrary, he has fought like a tiger to retain the valuable minority interest this stock represents.

Nowhere have the duties of the pledgee been any more carefully defined than by this Court in the case of *Faivret v. First Nat. Bank in Richmond,* 160 F. 2d 827, 831, wherein the Court, speaking through Judge Garrecht, says:

> "In exercising the power of sale, the pledgee must act in good faith and safeguard the interests of the pledgor, and he is *bound* to exercise

> reasonable care and diligence to obtain what the property is worth." (Emphasis added.)

Nowhere is there a single word or inference that Wahyou did, or intended to, exercise reasonable care and diligence to obtain what the property was worth. The standard as recognized by this Court has not been met.

And as stated in the case of *Dibert v. Wernicke,* 6 Cir. 214 F. 673, 681:

> "That even where a contract waives notice and permits a sale to himself, the pledgee is still a 'trustee to sell,' not to buy, though with the prviledge of buying, if fairly sold."

The Court found that there was conflicting but substantial evidence to support the findings of the District Court. In this we disagree. The price placed upon the real estate by Nutting is not verified by the money that he paid for the stock. If the ranch was of a value as testified to by him, why did he within six months of that time pay $40.00 a share for 40 percent of the stock? In other words, his testimony impeaches itself.

On the other hand, the defendant Wahyou did not produce a single impartial witness to testify as to the value of the property. The testimony is limited to Wahyou, Nutting and Hogue, all of whom are and were stockholders—Hogue paid $70.00 a share for his stock, Nutting $40.00 for his and Corbari received $14.00 for his.

On the other hand, the very persons who testified as to the low value of this ranch secured a bank loan. The appraiser for the bank appraised the property at $487,000.00, and the application for the loan was in the amount of $225,000.00, which was approved.

We believe that a rehearing should be granted in this matter. As the case now stands a grave legal injustice has been done to these plaintiffs which can be corrected upon rehearing.

Dated, July 31, 1958.

Respectfully submitted,
PIKE & MCLAUGHLIN,
SMITH & EWING,
CARVER, MCCLENAHAN & GREENFIELD,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Dated, July 31, 1958.

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SMITH & EWING,
CARVER, MCCLENAHAN & GREENFIELD,
Attorneys for Appellants and Petitioners.